SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 397

NELLIE DALE CLEMENS,

Petitioner,

vs.

WILLIAM L. CLEMENS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals appears in the transcript of record at page 19, and is only reported at this time in 72 Washington Law Reporter, 476.

The questions presented, Statutes involved, Statements of Jurisdiction and of the Case, as well as reasons relied upon, appear in the foregoing Petition, and in interest of brevity are not repeated here.

Specification of Error.

It was error to refuse full faith and credit to the judgments and proceedings of the Supreme Court of the State of New York, which acquired first jurisdiction over these parties and the subject-matter, and held the husband guilty of cruel and inhuman conduct, desertion, and non-support, and enjoined him from commencing any action

or actions outside that State affecting the marital status of the parties.

There was no voluntary separation of the parties hereto within the meaning of Section 403, Title 16, District of Columbia Code, where it clearly appears the New York State Court had found the husband had been so cruel it was unsafe and improper for petitioner to cohabit with him, and it was error to hold their separation was voluntary in such circumstances.

It was error to grant the husband an absolute divorce upon the ground of five years voluntary separation when he was guilty of such conduct that made it unsafe and improper for petitioner to cohabit with him and which had been judicially determined by a court of competent jurisdiction.

It was error to hold in effect that a husband may by his own misconduct render life with him by his wife intolerable, and dangerous to her very life, and at the expiration of five years grant him an absolute divorce upon the ground of voluntary separation if the wife has not in the meantime offered to return to live with him and thereby possibly place her life in jeopardy.

Argument.

1. That the Courts of the District of Columbia should give full faith and credit to the judgments and proceedings of the Supreme Court of New York is beyond question. They are entitled to full faith and credit, not just some faith and credit, and this Court has uniformly so held.

Williams v. *State of North Carolina*, 317 U. S. 287, 63 S. Ct. 207;

Davis v. *Davis*, 305 U. S. 32, 59 S. Ct. 3;

Barber v. *Barber*, 62 U. S. 582, 21 How. 582, 16 L. Ed. 226.

The holding that the parties to this litigation had lived apart voluntarily for five years prior to the date suit was filed (May 7, 1941) is contrary to the judgments and proceedings of the New York Court between the same parties, as shown by its Findings of Fact, Conclusions of Law, and Judgments of April 13, 1940, and July 25, 1941. Indeed, as late as March 10, 1937, the husband did not think there was a voluntary separation, for on that date he filed a suit in the District Court here, Equity No. 63,886, against petitioner for absolute divorce upon the ground of *desertion*, his complaint being under oath.

It will be remembered also that the New York Court first acquired jurisdiction over these parties and the subject-matter and restrained the husband from commencing any action or actions affecting the marital status of the parties outside the jurisdiction of that State.

2. Title 16, Section 403, District of Columbia Code does not authorize the granting of an absolute divorce to either party where a judgment for limited divorce has been entered and two years have thereafter elapsed, it specifically limits such action to the *innocent* party, certainly not the husband in this case.

There was some testimony by the husband in the District Court here about a separation agreement which had no place in the case, and the decisions here are in nowise based upon that angle. However, there was an agreement between the parties in the nature of a financial settlement, but which was terminated in accordance with its terms, as set out by the husband under oath in his Answer filed in the District Court here (Original Record 33). The New York judgment and proceedings subsequently rendered made no mention of it which confirms the husband's state-

ment it had been terminated, and consequently was of no evidentiary value in the case on trial here.

The District of Columbia courts in this case appear to have relied almost entirely upon the ruling and reasoning set out in the case of *Parks* v. *Parks*, 72 App. D. C. 93, 116 F. (2d) 356, where the pertinent facts appear to us to be almost wholly dissimilar from those involved in the case at bar. There the husband deserted his wife. They entered into a separation agreement; the wife secured a limited divorce on the ground of desertion. Later the husband applied for a divorce upon the ground of voluntary separation for five years which was granted. The Court of Appeals affirmed upon the somewhat doubtful ground, among others, that because the deserted spouse had not endeavored to effect a reconciliation she finally consented to the separation and made it voluntary. Whatever the equity might be in that case, where there was at least an outstanding separation agreement between the parties, it does not seem to be in point here. It is one thing for a husband to desert his wife without presenting any violence or danger to her life or limb, and that continues for five years without any effort on her part to effect a reconciliation, but it is quite a different situation where he beats his wife so inhumanly as to render it unsafe and improper for her to cohabit with him. In that circumstance could it in reason be said the wife must agree to go back with him, if he would take her back, and go through the same abuse again, or face the alternative that he could have a Federal court grant him an absolute divorce upon the ground of *voluntary* separation, and afford him an opportunity to marry again and possibly repeat the performance?

The adjective *voluntary* in its accepted everyday use according to Webster's Unabridged Dictionary (1937) means,

> 1. Unrestrained by any external influence, force or interference; not compelled, prompted, or suggested by another; acting of one's or its own free will, choice, or accord; spontaneous.

The construction placed upon the voluntary separation language of the District of Columbia Code in this case is difficult to reconcile with the above definition, and it is earnestly submitted should not be allowed to stand.

That it is against sound public policy to grant a husband license to beat his wife until she is compelled to flee for her very life, and then within the comparatively short space of five years grant him a divorce upon the ground of voluntary separation, we submit, cannot be successfully denied, and Congress never intended any such result.

Conclusion.

It is earnestly submitted the petition for allowance of writ of certiorari in this case should be granted.

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